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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1969

CARL REYNOLDS SHELTON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MELVIN G. RUEGER
Prosecuting Attorney

LEONARD KIRSCHNER
Ass't Prosecuting Attorney

ROBERT K. SACHS
Ass't Prosecuting Attorney
Room 420, Hamilton County
Court House,
Cincinnati, Ohio 45202
ATTORNEYS FOR
RESPONDENT

MELVIN L. WULF
JOEL M. GORA
DAVID L. STERLING
ATTORNEYS FOR PETITIONER

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AUTHORITIES

Texts Cited:

Ohio Revised Code, Section 2953.21 .....3, 6, 8
Ohio Revised Code, Section 2301.20 ..... 5, 14
Ohio Revised Code, Section 2953.05 ..... 5, 8

Articles Cited:

"The Prosecutor" Vol. 5, No. 5, page 335 14

Cases Cited:

Gideon v. Wainwright, 372 U.S. 335,
9 L. Ed. (2d) 799, 83 S. Ct. 792 (1963) 10
Frand v. U.S., 301 F. (2d) 102 (1962) 12
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OPINIONS BELOW

The Petitioner's citation of the Opinions Below appears to be a correct statement of the opinions in this matter and the Respondent concurs in the verbiage of the Opinions as reported in Defendant-Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on October 13, 1969. This judgment was based upon certain Findings of Fact and Conclusions of Law as rendered by the Court of Common Pleas of Hamilton County, Ohio on its Decision in a hearing, and Petition to Vacate Sentence. In addition, in that proceeding, certain stipulations of fact were attached and made a part

of the Findings of Fact. (See Appendix 1). Nowhere in the Findings of Fact and Conclusions of Law or in the Stipulation of Facts by the parties which were referred to in the Findings of Fact and Conclusions of Law were there any findings by the lower Court that the Defendant-Petitioner was not advised of his Appellate rights by his attorney. At no time has the Defendant-Petitioner ever filed in the Court of Appeals of Ohio for the First Appellate District, a Motion for Leave to Appeal based on any alleged failure of counsel to advise him of his appellate rights.

It is the belief of the Respondent that the Petitioner's conviction under the laws of the State of Ohio and the Findings of Fact and Conclusions of Law upon which this Petition for Certiorari is based was consistent with the United States Constitution and its Amendments, and that this Court should not assume jurisdiction.

QUESTIONS PRESENTED

Counsel for the Defendant-Petitioner in this matter has submitted three questions which he believes to be presented in this matter. However, as indicated in our statement on jurisdiction, this is an appeal from certain Findings of Fact, Conclusions of Law, and dismissal of a Petition to Vacate Sentence based upon a hearing and certain stipulated facts. Although counsel for the Petitioner has raised the question of advice relative to an appeal in his questions 2 and 3, neither the Findings of Fact, nor the Stipulation of Facts make any reference thereto. Accordingly, it is the contention of the Respondents in this matter that Items 2 and 3 of the Defendant-Petitioner's Petition for a Writ of Certiorari are irrelevant and immaterial and are not encompassed as a result of said

Findings of Fact, Conclusions of Law and Entry Dismissing the Petition to Vacate Sentence as filed by the Defendant-Petitioner in the lower Court and upon which this appeal is based.

We respectfully submit therefore, that there are only two questions before this Court, namely:

1. Does the failure of a Court appointed Attorney to request a stenographer to be present to record the trial proceedings in a criminal proceeding constitute incompetency upon the part of said attorney?

2. If it is determined that said failure to request a stenographer is incompetency on behalf of said Defendant-Petitioner, is such incompetency of such a nature as to violate the rights of Defendant-Petitioner insofar as the Sixth and Fourteenth Amendments of the United States Constitution are concerned?

STATUTES INVOLVED

Ohio Revised Code, Section 2953.21 PETITION TO VACATE OR SET ASIDE SENTENCE.

"(A) Any person convicted of a criminal offense or adjudicated delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as will support his claim for relief.

(B) The clerk of the court in which the petition if filed shall docket the petition and bring it promptly

to the attention of such court. A copy of the petition need not be served by the petitioner on the prosecuting Attorney. The clerk of the court in which the petition is filed shall immediately forward a copy of the petition to the prosecuting attorney of that county.

(C) Before granting a hearing the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including but not limited to the indictment, the court's journal entries, the journalized records of the clerk of court, and the court reporter's transcript. Such court reporter's transcript if ordered and certified by the court shall be taxed as court costs. If the court dismisses the petition it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within such further time as the court may fix for good cause shown, the prosecuting attorney shall respond by demurrer, answer, or motion. Within twenty days from the date the issues are made up either party may move for summary judgment as provided in section 2311.041 (2311.04.1) of the Revised Code. A bill of exceptions is not necessary in seeking summary judgment. The right to such judgment must appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues, hold the hearing, and make and file written findings of fact and conclusions of law upon entering judgment thereon.

(F) At any time before the demurrer, answer, or motion is filed, the petitioner may amend his petition with or without leave or prejudice to the proceedings.

The petitioner may amend his petition with leave of court at any time thereafter.

(G) If the court finds grounds for granting relief, it shall, by its judgment, vacate and set aside the judgment, and shall, in the case of a prisoner in custody, discharge or resentence him or grant a new trial as may appear appropriate. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail.

(H) Upon the filing of a petition pursuant to this section by a prisoner in a penal institution who has received the death penalty the court may stay execution of the judgment challenged by the petition."

Ohio Revised Code, Section 2301.20 COURT MAY ORDER FULL REPORT OF TESTIMONY.

"Upon the trial of a case in the court of common pleas, if either party to the suit, or his attorney, requests the services of a shorthand reporter, the trial judge shall grant the request, or such judge may order a full report of the testimony or other proceedings, in which case such shorthand reporter shall take accurate shorthand notes of the oral testimony or other oral proceedings, which notes shall be filed in the office of the official shorthand reporter and carefully preserved."

Ohio Revised Code, Section 2953.05 APPEALS.

"Appeal under section 2953.04 of the Revised Code, may be filed as a matter of right within thirty days after judgment and sentence or from an order overruling a motion for a new trial or an order placing the defendant on probation and suspending the imposition of sentence in felony cases, whichever is the latter. Appeals from judgments or final orders as above defined in magistrate courts shall be taken within ten days of such judgment or final order. After

the expiration of the thirty day period or ten day period, as above provided, such appeal may be taken only by leave of the court to which the appeal is taken. An appeal may be taken to the supreme court by giving notice as provided by law and rule of such court within thirty days from the journalization of a judgment or final order of the court of appeals in all cases as provided by law."

STATEMENT OF THE CASE

The Petitioner was indicted by the Hamilton County, Ohio Grand Jury on March 29, 1963 for the crime of Auto Theft. On or about April 2, 1963, the Court of Common Pleas of Hamilton County, Ohio, appointed one Owen K. Blythe as the Petitioner's attorney. Petitioner's case went to trial on May 10, 1963. There was no request made that a stenographer be present to record the proceedings, nor is there a trial Transcript of the proceedings had at said trial. Defendant-Petitioner was convicted of the offense of Auto Theft and he was sentenced to an indeterminate term in the Ohio Reformatory.

In September, 1966, the Petitioner filed on his own behalf, a Petition to Vacate Judgment pursuant to *Ohio Revised Code, Section 2953.21.* The Petition to Vacate Sentence was denied on September 28, 1966 and Defendant-Petitioner, out of time, filed a Notice of Appeal from that decision to the Court of Appeals of the First Appellate District of Ohio. The Court of Appeals of the First Appellate District of Ohio, on January 19, 1967, denied the Petitioner leave to appeal from the dismissal of his Petition to Vacate Judgment.

Thereafter, on October 16, 1967, the Petitioner, while represented by counsel, filed a new Petition to Vacate Sentence in the Court of Common Pleas of Hamilton County, alleging that he had been denied effective representation of

counsel. A hearing was had on this Petition to Vacate Sentence and certain Stipulations of Fact were submitted. The Court of Common Pleas subsequently issued certain Findings of Fact, Conclusions of Law, and an Entry Dismissing the Petition to Vacate Sentence. The Findings of Fact, Conclusions of Law, etc., are set forth on pages 17 and 18 of the Appendix of the Defendant-Petitioner's Petition for a Writ of Certiorari. The Stipulation of Facts are set forth in Respondent's Appendix 1. Thereafter, the said Defendant-Petitioner, through his counsel, filed a Motion to Enlarge the Findings of Fact and Conclusions of Law, which Motion to Enlarge was denied by the lower Court. The Defendant-Petitioner, through his counsel, filed an appeal in the Court of Appeals of the First Appellate District of Ohio. After Briefs had been submitted and arguments heard, the Court of Appeals of the First Appellate District of Ohio affirmed the finding of the Court of Common Pleas. Thereafter, Defendant-Petitioner, through his counsel, filed a Motion for Leave to Appeal to the Supreme Court of Ohio. After Briefs had been submitted in this matter and arguments heard before the Ohio Supreme Court, the Court, on October 1, 1969, dismissed the Appeal for the reason that no substantial Constitutional question existed.

At no time did the Court of Common Pleas of Hamilton County, Ohio, ever rule either that the Defendant-Petitioner was or was not advised of his Appellate rights. At no time did the Defendant-Petitioner in his appeal to the Supreme Court of Ohio ever raise the issue as to the alleged failure of the Court of Common Pleas to make a Finding of Fact in that matter. Accordingly, the Respondent must deny the statement of the Petitioner in his Petition for a Writ of Certiorari that the issues and questions presented before this Court were properly raised throughout the proceedings in the courts of Ohio.

The record further reveals that at no time did the Defendant-Petitioner ever file a Motion for Leave to Appeal directly from his conviction in 1963.

REASONS FOR DENYING WRIT

The responsibility of a Court appointed attorney to safeguard his indigent client's rights as to the issues raised by the Petitioner in this Petition for a Writ of Certiorari does not involve any substantial constitutional issue. *It is to be specifically pointed out and emphasized in these proceedings that at no time has the Defendant-Petitioner filed a Motion for Leave to Appeal to the Court of Appeals of the First Appellate District from his conviction as he may do under Ohio Revised Code, Section 2953.05.* For the past two years during the proceedings on the Defendant-Petitioner's Second Petition to Vacate Sentence, he has been represented by legal counsel.

As previously indicated and a point that cannot be over emphasized the Findings of Fact, Conclusions of Law, and Entry Dismissing the Petition to Vacate Sentence, nowhere makes any specific reference to this issue. Counsel raises the question in an effort to bring about Constitutional issues which were not properly before the Court of Common Pleas under the Petition to Vacate Sentence statute. (O.R.C. Sec. 2953.21) The sole and only question which was determined by the Court of Common Pleas of Hamilton County, Ohio, was that the failure to have a stenographer transcribe a court hearing in 1963 did not deprive the Petitioner of his right to effective counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States. The sole and only question to be determined by this Court is whether or not the failure to have a stenographer transcribe a court hearing is incompetence per se; and, if

it is considered to be incompetency, is this incompetency of such a degree and nature as to violate the Defendant's Constitutional right to a fair trial and due process of law? We respectfully submit that the answers to each of these questions is "no" and that the Petition for a Writ of Certiorari should not be granted in this case. It is further submitted that counsel has the effective and proper means of filing a Motion for Leave to Appeal in the State Court of Appeals, appealing directly from the Petitioner's conviction in 1963, rather than going through the round-about method involved herein. Accordingly, we feel that there is no great legal issue nor is there any reason for granting this Writ.

1.

Does the failure of a court appointed attorney to request a stenographer to be present to record the trial proceedings in a criminal proceeding constitute incompetency on the part of said attorney?

As indicated previously, with due respect to counsel for Defendant-Petitioner, he has raised issues in his Appellate Brief and the Petition for a Writ of Certiorari, which were not involved in the Findings of Fact and Conclusions of Law and Entry Dismissing his Petition to Vacate Sentence; nor were they involved in the various Appellate proceedings that he undertook. Defendant-Petitioner in this matter did have and still has the right to file in the Court of Appeals of the First Appellate District of Ohio, a Motion for Leave to Appeal. This would be the direct Appellate procedure relative to his conviction in 1963 if his allegation that his client was not advised of his Appellate rights is true.

We are fully in accord and we have no questions relative to the rights of counsel as set forth in the case of *Gideon* v. *Wainwright*, 372 U.S. 335, 9 L.ed. 2d 799, 83 S.Ct. 792 (1963).

We are also in accord that defense counsel representing defendants must do so competently. Hindsight is always better than foresight. To permit the attack upon every maneuver by a defendant's attorney, by courts sitting back and reflecting on the outcome of the situation, and by courts not directly in the line of fire would, in our opinion, be a travesty upon justice. There is no attorney in the world who, at one time or another, has not said to himself, regarding a question of judgment, that in looking back over the situation, perhaps he should have taken another course or another line of attack in the proceedings. Is this Court willing to say at this time that it will review and order every state court to review every decision of an attorney made in the course of trial; and, if errors of judgment are found they will cause reversal of the conviction. We respectfully believe that this is not and should not be the law.

The next question which arises is it incompetent or ineffective for an attorney to fail to request that a reporter be available and transcribe the evidence and testimony as presented at the time of the trial. It is very rare of an attorney that he requires every item, every comment, and every trial in which he has ever participated in, to be officially recorded and transcribed. At the time that this appeal was filed, Respondent's counsel checked the criminal appearance docket book No. 130 of which this case is listed and which consisted of 600 initial bind-over cases after arraignment proceedings. Of the 600 cases involved in bind-over proceedings as it appears in Docket Book 130, a check was then made relative to the number

of court appointed attorneys who went to trial with a court reporter being requested and those who went to trial without a court reporter being requested. An additional check was then made relative to defendants who went to trial with retained counsel who had requested at the time of the trial a reporter; and defendants who went to trial with retained counsel who had not requested an official stenographer. From the records of the Hamilton County Court of Common Pleas, Criminal Court Clerk's office, Criminal Appearance Docket No. 130, it appears that of the 61 defendants who went to trial with court appointed counsel, 25 requested a court stenographer and 36 did not. It is further reflected that of 38 defendants that went to trial with retained counsel, 18 requested a reporter and 20 did not. The time period covered by the Criminal Appearance Docket Book 130 covers a period of December 28, 1962 to April 20, 1963, relative to bind-over of criminal cases. A further check was made of the book immediately preceding this one, being Criminal Court Appearance Docket Book No. 129, which also had 600 bind-over cases and which covered a period from August 25, 1962 to December 26, 1962. Of the 59 defendants who went to trial with appointed counsel, 29 requested an official stenographer whereas 30 of them did not request an official stenographer. Of the 36 defendants who went to trial with retained counsel, 21 requested a stenographer whereas 15 did not request a stenographer. The sum total of these two books indicate that in the two docket journal books 54 defendants who were represented by court appointed attorneys had their attorneys request an official stenographer whereas 66 defendants who were represented by court appointed attorneys did not so request an official court stenographer. The record further reveals by virtue of these two samples of the proceed-

ings in 1963 that 39 defendants with retained counsel requested court reporters whereas 35 defendants with retained counsel did not request an official stenographer.

We fully appreciate the fact that the above statistics and samplings as shown by the dockets, records and journal entries of the Court of Common Pleas of Hamilton County, Ohio, are not binding upon this Court.

However, we further submit that this information is very relevant and material in determining any question relative to alleged ineffectiveness or incompetency of legal counsel. As the Federal Court of Appeals in *Frand* v. *U.S.*, stated in 301 F (2nd) 102 (1962):

> *"The constitutional right to effective assistance of counsel does not vest in the accused the right to the services of an attorney who meets any specified aptitude test in point of professional skill, and common mistakes on the part of counsel, common mistakes of strategy, common mistakes of trial tactics, or common errors of policy in the course of a criminal case do not constitute grounds for collateral attack upon the judgment and sentence under the statute.* It is instances in which resulting from the substandard level of services of the attorney the trial becomes a mockery and farcial that the judgment is open to collateral attack on the grounds that the accused was deprived of his constitutional right to effective counsel. Mitchell v. U.S., 104 U.S. App. D.C. 57, 259 F. (2nd) 787, Cert. denied 358 U.S. 850, 79 S. Ct. 81, 3 L.Ed. (2nd) 86; Black v. U.S., 9 Cir. 269 F. (2d) 38, Cert. denied 361 U.S. 938, 80 S. Ct. 379, 4 L. Ed. (2nd) 357." (Emphasis ours)

The Court of Appeals of the Ninth Circuit Court of Appeals in the case of *Kruchten* v. *Eyman,* as reported in 406 F. (2d) 304 (1969), at page 312, said:

> "The issue is not what counsel should have done to constitute the proper representation of Kruchten,

> considering the case in retrospect after the death sentence was imposed but rather, whether in the circumstances as viewed at the time of the action was taken, did Kruchten receive effective assistance of counsel. 'Ineffective assistance' has been held by this Court to mean conduct by counsel as to 'be so incompetent as to make the trial a farce or a mockery of justice, a representation so ineffective as to be shocking to the conscience of the court'."

There are numerous other cases in the Federal District Courts and Federal Courts of Appeal and in the State courts about the country relative to effective assistance of counsel. However, all of them seem to proceed along the lines that the representation must be so incompetent or negligent as to constitute the proceedings a farce or a mockery of justice shocking to the conscience of the court.

Can it be said that because the attorney in this case did not request an official court stenographer as he could have done back in 1963 when this case was tried that he was incompetent or negligent so as to constitute the proceedings of the trial as a farce or mockery of justice shocking to the conscience of the court. Add to this factor the fact that during this same period of time that this case arose and was tried only 54 of the defendants represented by court appointed attorneys out of a total of 120 who went to trial requested the services of a court reporter. Further can it be said that the representation by counsel in this matter was so incompetent or negligent as to constitute the proceedings a farce or mockery of justice shocking to the conscience of the court when only 39 defendants who went to trial with retained counsel out of a total of 74 requested the official court reporter to be present and to transcribe the testimony.

It is to be pointed out that under Ohio law the question of indigency does not determine whether a reporter

is present during a trial or not. A court reporter is automatically provided by virtue of *Ohio Revised Code, Section 2301.20,* which was in effect at the time that this trial initially took place.

This is, therefore, not a situation as to the type of trial that a man gets being based upon his finances. As indicated by the records of the criminal court, docket appearance books previously referred to, destitute defendants were afforded the same rights relative to the obtaining of a transcript as those who had money to purchase a transcript. There is no question now nor was there any question at the time, that indigent defendants could have a court reporter present to transcribe the testimony at the time of the trial.

The entire nature and methods of trial procedures in criminal cases has changed substantially during the past five years. As Evelle J. Younger, District Attorney of the County of Los Angeles and Vice President of a National District Attorneys' Association, stated in a recent article which initially appeared in the Loyola Law Review and which was published in Volume 5, No. 5 of "The Prosecutor" at page 335, under an article titled "The Appellate Syndrome":

> "Where the opposing attorney formerly produced evidence to convict or acquit, now the emphasis is upon raising constitutional and procedural issues and preserving these points for appeal . . . . It should be emphasized that in a modern criminal trial the critical issue most commonly raised is no longer the guilt or innocence of the defendant. The trial serves more and more as a mere prologue to appeal. It is the first stage necessary for seemingly endless appellate review."

It is the opinion of the Respondent that these few words in the article above quoted spell out what we believe to

be the basic problem and issue in this case. Criminal procedures, criminal trials, criminal methods, relative to the trial and proceedings thereon have substantially changed in the past seven years. Can we now judge an attorney's strategy, trial tactics, or method of trial which occurred in 1963 by virtue of the standards, procedures, and techniques which have developed over the past seven years.

As indicated above, we respectfully submit that the conduct of legal counsel in this matter relative to his not requesting an official court reporter to be present and transcribe the testimony was not conduct that was so incompetent as to make the trial a farce or a mockery of justice and the representation thereof so ineffective as to be shocking to the conscience of the Court.

2.

If it is determined that said failure to request a stenographer is incompetency on behalf of said Defendant-Petitioner, is such incompetency of such a nature as to violate the rights of the Defendant-Petitioner insofar as the Sixth and Fourteenth Amendments of the United States Constitution are concerned?

With regard to this question, we respectfully answer Defendant-Petitioner's constitutional rights were not violated, and that the Defendant-Petitioner's attorney's conduct must be based upon the conduct of attorneys at the time that the trial was had in 1963. However, even if it is considered that the attorney's conduct was improper, in not requesting a reporter, it is our opinion that the Defendant-Petitioner's Constitutional rights were not violated even if it is considered to be improper not to have requested a reporter. As indicated previously, it is

our humble judgment that hindsight is always better than foresight. However, for a reviewing court to say almost seven years after the conviction, that what counsel did at the time of his trial was incompetent and was of such incompetency so as to violate the Constitutional rights of his client, without having all of the intracacies and reasons and background, including the disposition of the Courts at that time in arriving at the conclusion of counsel; would, in our opinion, be a gross miscarriage of justice by this Court.

CONCLUSION

In conclusion, we respectfully submit that the Constitutional rights of the Defendant-Petitioner in this case were not violated. Defendant-Petitioner still has the avenue of appeal by filing a Motion for Leave to Appeal in the Court of Appeals of the First Appellate District of Ohio. It is further submitted that the failure of counsel to request a court reporter at the time of trial is not error per se so as to violate the Constitutional rights of the Defendant-Petitioner to a fair and impartial trial. Accordingly, we respectfully submit that the Petition for a Writ of Certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

MELVIN G. RUEGER
Prosecuting Attorney
LEONARD KIRSCHNER
Ass't Prosecuting Attorney
ROBERT K. SACHS
Ass't Prosecuting Attorney
ATTORNEYS FOR
RESPONDENT

APPENDIX 1.

In the

COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO
Criminal Division

Case No. 82392

CARL REYNOLDS SHELTON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

STIPULATION OF FACTS

The undersigned, attorneys of record for all parties to the above-named case, having visited on Monday, the 8th day of January, 1968, Owen K. Blythe, appointed by this court on April 2, 1963 to represent Carl Reynolds Shelton at the original trial of this case, and having discussed said case with him, do stipulate to the following facts:

1. Said Owen K. Blythe averred that it was his practice, when representing an indigent defendant, to request that a stenographer be present at trial to record the proceedings only when he thought "he had a good chance of winning a case," and that he made no such request in the above-named case.

2. Said Owen K. Blythe averred further that he was appointed to represent seven or eight indigent defendants during the year, 1963, that he kept no files of proceedings in such cases after their disposition, that he does not remember the facts of or his procedures as counsel to Carl Reynolds Shelton in the above-named case, and that he has not kept a file of the proceedings in said case so that he may refresh his memory.

/s/ DAVID L. STERLING
David L. Sterling
Attorney for Petitioner

/s/ ROBERT K. SACHS
Robert K. Sachs
Attorney for Respondent